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No. 86-5375

In The
Supreme Court of the United States
October Term, 1986

CHRISTOPHER A. BURGER,
Petitioner,

v.

RALPH KEMP, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1.

Is trial counsel's representation *per se* ineffective when there is no joint representation and no conflict of interest, but an attorney with whom counsel is professionally associated represents a co-indictee at a separate trial?

2.

Is trial counsel *per se* ineffective when, after a thorough investigation and consultation with his client, counsel makes a sound strategic decision, uncontested by the defendant, not to present marginal and potentially damaging character evidence on the sentencing phase of a capital trial?

3.

Does the inclusion of talismanic words and phrases in a trial court's charge on an element of the offense *ipso facto* render the charge unconstitutionally burden-shifting, or must the charge be reviewed in its entirety to ascertain any alleged unconstitutional burden-shifting effect?

4.

Does *Rose v. Clark*, — U.S. —, 106 S.Ct. 3101 (1986), mandate a finding of harmless error as to an alleged burden-shifting charge where the evidence is overwhelming?

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

The Petitioner was convicted of murder in the Superior Court of Wayne County, Georgia on January 25, 1978, at the conclusion of a jury trial that commenced on January 23, 1978. A sentence of death was imposed. On direct appeal to the Supreme Court of Georgia Petitioner's conviction was affirmed; however, Petitioner's sentence of death was vacated and a new trial was ordered as to sentencing in *Burger v. State*, 242 Ga. 28, 247 S.E.2d 834 (1978).

The Petitioner was subsequently retried on the issue of punishment before a jury commencing on July 16, 1979. On July 19, 1979, the Petitioner was again sentenced to death. On direct appeal the Supreme Court of Georgia

affirmed the Petitioner's sentence in *Burger v. State*, 245 Ga. 458, 265 S.E.2d 796, *cert. denied*, 448 U.S. 913 (1980).

State habeas corpus relief was denied on October 1, 1980. On October 2, 1980, the Petitioner filed an application for habeas corpus relief in the United States District Court for the Southern District of Georgia, Brunswick Division. On April 29, 1981, the district court denied habeas corpus relief as to Petitioner's conviction, but granted partial relief in the form of an Order vacating Petitioner's sentence of death. *Burger v. Zant*, 513 F.Supp. 772 (S.D. Ga. 1981). The grant of relief was based solely upon the circuit court's decision in *Stephens v. Zant*, 631 F.2d 397, *modified on panel rehearing*, 648 F.2d 446 (5th Cir. 1981), *reversed, Zant v. Stephens*, 462 U.S. 862 (1983).

Pursuant to a timely appeal and cross-appeal by the Respondent and Petitioner respectively, the United States Court of Appeals for the Eleventh Circuit rendered its opinion on October 13, 1983, reversing the district court's grant of habeas corpus relief and adopting those portions of the district court's order denying relief. *Burger v. Zant*, 718 F.2d 979 (11th Cir. 1983). On February 13, 1984, Petitioner's petition for rehearing and suggestion for rehearing *en banc* was denied.

On May 29, 1984, this Court granted certiorari and remanded for reconsideration in light of *Strickland v. Washington*, 466 U.S. 668 (1984). *Burger v. Zant*, — U.S. —, 104 S.Ct. 2652 (1984). The circuit court remanded this matter to the district court for reconsideration as required by this Court's order. *Burger v. Zant*, 741 F.2d 1274 (11th Cir. 1984). After reexamination of the effective assistance of counsel issue in light of *Strickland v. Washington*,

supra, the district court again found no constitutional error.

On February 5, 1985, the circuit court affirmed the district court's finding that Petitioner was in fact rendered the effective assistance of counsel. *Burger v. Kemp,* 753 F.2d 930 (11th Cir. 1985). Petitioner's petition for rehearing *en banc* was denied on March 25, 1985.

Petitioner again petitioned this Court for a writ of certiorari upon claims of ineffective assistance of counsel and the existence of an allegedly burden-shifting charge. In *Burger v. Kemp,* — U.S. —, 106 S.Ct. 41 (1985), this Court granted certiorari and remanded for reconsideration in light of *Francis v. Franklin,* 471 U.S. —, 105 S.Ct. 1965 (1985), on the burden-shifting charge issue. Upon reconsideration, and in light of this Court's then very recent opinion in *Rose v. Clark,* — U.S. —, 106 S.Ct. 3101 (1986), the circuit court assumed the trial court's charge on intent was unconstitutionally burden-shifting, but found the same to be harmless beyond a reasonable doubt. *Burger v. Kemp,* 785 F.2d 890 (11th Cir. 1986), *rehearing denied,* 796 F.2d 1313 (11th Cir. 1986).

On November 3, 1986, this Court granted Petitioner's application for a writ of certiorari. This brief by the Respondent follows.

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STATEMENT OF FACTS

James Botsford, an army tank driver stationed at Fort Stewart, Georgia, had known Petitioner and co-indictee Thomas D. Stevens in Army Basic Training. (T. 85-88).[1] Arriving at the Savannah Airport on September 4, 1977, Botsford telephoned the army base at approximately 10:00 p.m. to ask about getting a ride from the airport to Fort Stewart. (T. 88-89, 90). He spoke to Petitioner who told Botsford that Petitioner and Stevens would pick him up at the airport. (T. 89). About two hours later Petitioner and Stevens arrived at the airport in a cab which Petitioner was driving. (T. 90). After Botsford got in he was told by Petitioner and Stevens that the cab was stolen. (T. 91, 95). Petitioner also told Botsford that the victim was locked in the trunk of the cab. (T. 96).

Stevens informed Botsford that Stevens and Petitioner had used a knife and knife sharpener to force the cab driver to give them money and to perform "unnatural acts." (T. 96). With Petitioner driving, Stevens did most of the talking, but Petitioner voiced his agreement with what was said. (T. 93). Stevens then called back to the trunk: "Are you still there?" Botsford heard a reply, "Yes sir." (T. 97). Stevens showed Botsford the knife and knife sharpener, which Stevens pulled from underneath the front seat. (T. 97).

During the ride back to Fort Stewart, Stevens called back to the trunk three or four times asking the victim if he was there. (T. 103). Botsford always heard a voice an-

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[1]The transcript references in the following statement of facts are to the transcript of the original trial of January 23 through 25, 1978.

swer. (T. 103). Botsford further testified that Stevens explained in detail how he had sexually assaulted the victim and suggested that he [Stevens] and Burger kill the victim and burn the car. (T. 100, 101). Botsford asked Petitioner and Stevens to free the victim and he told them that he would not contact the police if they would not kill the cab driver. (T. 100-104). Petitioner and Stevens both agreed to let the victim go and ditch the cab. (T. 100, 104).

The following evening, Botsford was visited outside his barracks by fellow soldiers Petitioner and Stevens, who asked him if he had said anything. (T. 105-106). When Botsford told them he had not, they said they had freed the cab driver and ditched the cab near Hinesville, Georgia. (T. 107). Prompted by a radio bulletin that he later heard regarding a missing cab driver, Botsford went to the State Patrol and the Army Criminal Investigation Division with the information he possessed. (T. 108-109).

An army investigator, John Berzenski, was notified on September 6, 1977, of a missing cab and driver. (T. 134). Roger Honeycutt, the missing cab driver, was an army private also stationed at Fort Stewart, Georgia. (T. 121). He drove for the D&M Cab Company on nights and weekends. (T. 120-121).

Case agent Clarence Haire, also an army investigator, questioned members of Honeycutt's unit in the unit's orderly room on September 9th, in an attempt to locate Honeycutt. (T. 149). One of the men he questioned was Petitioner, who told Haire that he knew nothing about a D&M Cab, but that he and a friend called the Shuman Cab Company at about 10:00 p.m. on September 4th, but decided not to take the cab when it arrived at Fort Stewart. (T. 149-150). A Shuman cab driver testified at trial that he

did in fact get a call from Fort Stewart on September 4th, and, in response thereto, he drove to Fort Stewart accompanied by a friend. (T. 129-130). Two soldiers asked the driver if he had change for $50.00. The two soldiers then turned and walked away. (T. 130, 131). The two soldiers had told the driver that they were going to the airport. (T. 130). As the Shuman cab driver was leaving, the driver saw a D&M cab drive away from a nearby building at about 10:15 or 10:20 p.m. (T. 131).

On September 12, 1977, army investigators Berzenski and Haire found a boot along Highway 144 while traveling toward the Savannah Airport. The name of Roger Honeycutt was sewn inside the boot. (T. 134, 135, 136, 141). They found another boot, army socks and a piece of yellow plastic within 200 yards of each other along Highway 144. (T. 137-138, 144-147).

A Jackson-Denno hearing was held at trial to determine the voluntariness of Petitioner's confession made to Investigator Haire and Wayne County Detective F.J. Shuman. (T. 169-268). The trial court heard testimony from Investigator Haire, Detective Shuman and defense witness Dr. Joseph O'Haire, a clinical psychologist. The police officers testified regarding the voluntariness of Petitioner's statements.

Dr. O'Haire testified that Petitioner possessed a "mental deficiency" and a "psychopathic personality." (T. 248, 250). Dr. O'Haire also testified that while Petitioner understood the difference between right and wrong (T. 256), Petitioner was simply determined to do evil (T. 250), and would actually enjoy confessing his crimes to whomever would listen. (T. 250). Dr. O'Haire testified

that due to Petitioner's propensity towards violence, continued incarceration was required. (T. 248).

After hearing the testimony, the court ruled that the statements were voluntarily made. (T. 268). The jury returned to the courtroom.

Investigator Haire testified that he interviewed the Petitioner at 9:20 p.m. on September 12th, commencing with advising Petitioner of the *Miranda* warnings and the fact that the questioning would concern a missing cab driver. (T. 269-270). Petitioner, having been advised that he was charged with murder and sodomy, stated that he did not want a lawyer and would answer any questions posed, after which he read and signed a waiver of rights form. (T. 272-273). Initially, Petitioner denied any knowledge of Roger Honeycutt or Honeycutt's disappearance. (T. 276, 278). When informed that there existed information that he had been in possession of the missing cab, Petitioner made a confession. (T. 278). Investigator Haire related the contents of Petitioner's confession to the court and to the jury.

Petitioner stated that when he and Stevens ran out of money while drinking beer at the Enlisted Men's Club, Stevens suggested robbing a cab driver. (T. 278-279). The two men summoned a Shuman Company cab, but decided not to take it when it arrived with two men inside. (T. 279). Petitioner and Stevens then received a telephone call from Botsford, who was at the Savannah Airport, requesting a ride to Fort Stewart. Petitioner told Botsford that he and Thomas Stevens would pick him up at the airport. (T. 279).

Stevens and Petitioner both burglarized the dining hall where Stevens got a knife sharpener and Petitioner stole a twelve inch butcher knife. (T. 154, 278). Thus

armed, the two men telephoned and requested a D&M cab. (T. 280). When the cab arrived, Petitioner and Stevens asked the driver if he could change a $50.00 bill; the driver said he could. (T. 280). Approximately fifteen miles away from the army base on Highway 144, as planned by a prearranged signal, Stevens placed the knife sharpener to the driver's neck while Petitioner put the butcher knife to the driver's ribs. (T. 280).

The driver was forced to pull over, to get out, and to give Petitioner and Stevens all of his money. When the driver gave Petitioner and Stevens only $16.00 they asked the driver if he had more money; when he said that he did not, they searched the cab and then forced the driver into the back seat. (T. 281). While en route to the airport, with Petitioner driving, Stevens had the driver remove his boots and clothes which Stevens searched for money. (T. 281). Stevens threw each item of clothing out of the window after searching it. (T. 281).

While Petitioner drove, Stevens forced the nude victim, Roger Honeycutt, to perform oral sodomy on Stevens. (T. 282). Stevens then anally sodomized the victim. (T. 282). While Roger Honeycutt was being sexually assaulted, Petitioner asked the victim for directions to the airport. (T. 282). Before reaching the airport, Petitioner stopped the car; Petitioner and Stevens blindfolded Roger Honeycutt, tied the victim's hands with cord cut from the C.B. radio and then forced the nude victim into the trunk of the cab. (T. 282, 286). Petitioner and Stevens proceeded to the Savannah Airport to pick up their friend Botsford.

Because there was a police car at the entrance to the airport terminal, Petitioner parked the cab in the parking

lot. (T. 283). Stevens got out of the cab and later returned with Botsford. En route to Fort Stewart, with Petitioner driving, Petitioner and Stevens bragged to Botsford that they had stolen the cab and still had the bound driver locked in the trunk. (T. 283). In order to convince Botsford of the truth of their story, Petitioner and Stevens called back to their victim for a response. (T. 283). Stevens suggested that he and Burger kill the victim. Botsford protested and asked them not to kill the victim. Petitioner said that maybe they should just let him go. (T. 284).

After dropping Botsford off at Fort Stewart, Georgia, Petitioner and Stevens went to Jesup, Georgia. While driving up and down several dirt roads Petitioner made the car go "from side to side," in order to force the victim to roll around in the trunk. (T. 284). The two men then stopped at a Jack's Minit Market where Stevens purchased sandwiches and milk, removed the cab's dome light and hid it in some bushes. (T. 284). When Petitioner saw a patrol car, he got out of the cab and walked into the store. After the patrol car left, Petitioner and Stevens got back in the stolen cab and Petitioner drove away. (T. 284-285).

After noticing a patrol car following them, Petitioner and Stevens decided to get rid of the cab. (T. 285). Petitioner drove to a "borrow pit" where he and Stevens had gone swimming several times in the past. Petitioner and Stevens removed the cab's C.B. radio, after which they were careful to wipe their fingerprints from every area of the cab. (T. 286).

While Stevens was off hiding the C.B. radio in the bushes, Petitioner raised the lid of the trunk and asked the

victim if he was "all right." The victim responded, "Yes, sir." Petitioner then closed the lid of the trunk. (T. 345-346). (J.A. at 17-18). Petitioner immediately started the engine and drove the cab into the borrow pit, jumping from it just before impact with the water. (T. 286, 289). Petitioner and Stevens waited at the scene of the murder, watching the cab to make certain that it sank beneath the surface. (T. 286, 345). Petitioner candidly admitted that he killed the cab driver to prevent the driver from later identifying him and Stevens. (T. 287). (J.A. at 13).

Haire and two other men from the Criminal Investigation Division, pursuant to Petitioner's directions and accompanied by Petitioner, drove to the borrow pit. (T. 289). Shortly afterwards, Detective Mike Deal arrived at the borrow pit where the missing cab was ultimately recovered. (T. 152, 161). A knife and a knife shapener were found on the right floorboard of the cab. (T. 157, 158). A nude decomposing body found in the trunk of the car was subsequently identified as that of Roger Honeycutt. (T. 306, 308, 311). The cause of death was drowning. (T. 308).

Wayne County Detective F.J. Shuman testified at trial that he took Petitioner from Fort Stewart authorities to the Wayne County Jail on September 13, and advised Petitioner of the *Miranda* warnings. (T. 319-320). Shuman and Petitioner went over Petitioner's statement to Haire word-by-word, and Petitioner affirmed to Shuman everything contained in the statement. (T. 322). Petitioner also added that he and a friend, Mark E. Baldwin, had returned to the borrow pit to get the cab's C.B. radio, and that the radio was in Petitioner's mother-in-law's automobile. (T.

323). The radio was in fact recovered from Petitioner's mother-in-law's stationwagon. (T. 323).

On September 14, Petitioner directed Wayne County authorities over the same route that he had driven the stolen cab. (T. 325). The cab's dome sign was recovered from bushes near a convenience store and the yellow plastic found on Highway 144 was determined to have come from that dome sign. (T. 326, 328, 329).

Further facts will be developed as needed to further illuminate the issues raised herein.

SUMMARY OF THE ARGUMENT

Petitioner and Thomas D. Stevens were co-indicted for the malice murder of Roger Honeycutt. Mr. Alvin Leaphart, a local attorney experienced in capital litigation, was appointed to represent Petitioner. Mr. Robert Smith, Mr. Leaphart's law partner, was separately appointed to represent Thomas D. Stevens. In preparation for trial Mr. Leaphart made favorable use of Mr. Smith's energies and expertise in that he shared the burdens of the legal research with Mr. Smith, discussed legal issues and interviewed co-indictee Stevens in hopes of ascertaining any information favorable to Petitioner. At all times Mr. Leaphart considered himself as counsel solely for Petitioner.

Petitioner was tried first and separately from co-indictee Stevens. At trial Mr. Leaphart portrayed Stevens as the more culpable party and the architect of the criminal enterprise. Mr. Leaphart's uncontradicted testimony

was that if crucifying Thomas D. Stevens at Petitioner's trials would have helped Petitioner, he would have done it. Mr. Leaphart tried Petitioner's cases in their entireties and took absolutely no part in the trials of co-indictee Stevens.

As counsel for Petitioner, Mr. Leaphart attempted to negotiate a guilty plea for a reduced sentence; however, the district attorney flatly refused to discuss plea negotiations on any level. Therefore, Mr. Leaphart was never afforded the opportunity to engage in plea negotiations on Petitioner's behalf in any manner.

Mr. Leaphart's efforts as appellate counsel successfully resulted in the vacating of Petitioner's original sentence of death by the Supreme Court of Georgia. After reimposition of the death sentence, following Petitioner's retrial on sentencing, Mr. Leaphart raised every allegation on appeal that he could identify. Because Petitioner was the actual "triggerman," Mr. Leaphart, experienced trial counsel, astutely noted the frivolity of arguing Petitioner's alleged lesser culpability before the appellate court.

While Mr. Leaphart made favorable use of Mr. Smith's assistance and expertise, these actions cannot be construed as the legal representation of Thomas D. Stevens by Mr. Leaphart. Because Petitioner and Stevens were represented by separate counsel, at separate trials, before juries aware only of the issues and legal defenses presented in the proceedings before them, and because there existed no conflict in the defenses presented by Petitioner and his co-indictee, there existed no actual conflict of interest. Further, because Mr. Leaphart, at Petitioner's trials, vigorously portrayed Stevens as the architect and prime mover

behind the murder and Petitioner as merely a younger follower, it cannot reasonably be contended that Mr. Leaphart tailored his defense of Petitioner so as to protect co-indictee Thomas D. Stevens. Neither can it reasonably be contended that Mr. Leaphart's decision, as an experienced attorney, not to argue Petitioner's alleged lesser culpability on appeal, where the evidence reflects that Petitioner was the actual "triggerman," was the result of Mr. Leaphart's alleged desire to protect Thomas D. Stevens. The facts simply do not support Petitioner's contentions that Mr. Leaphart jointly represented Petitioner and his co-indictee. that at their separate trials Petitioner's and Stevens' defenses were conflicting or that Mr. Leaphart tailored his actions so as to protect Thomas D. Stevens.

In preparation for the sentencing phase of Petitioner's trials, Mr. Leaphart conducted a thorough investigation for potentially mitigating evidence. Counsel was able to ascertain only evidence of marginal value and which carried with it the possibility of extremely damaging effects if the witnesses were subjected to a thorough and sifting cross-examination by the district attorney. After consultation with the Petitioner and Petitioner's mother, trial counsel made a strategic decision, uncontested by the defendant at trial, not to present this potentially damaging evidence. Instead, counsel elected to emphasize the disparities between Petitioner's age and that of his co-indictee, and the disparities in the number and severity of criminal offenses committed by Petitioner, as compared to his co-indictee. Counsel is not *per se* ineffective for making a sound strategic decision not to present potentially damaging evidence on the sentencing phase of trial, after hav-

ing made a thorough investigation and after consultation with his client.

Though Petitioner identifies two talismanic sentences contained in his charge which were also contained in another trial court's charge ultimately found to be unconstitutionally burden-shifting by this Court, the same does not automatically mandate a finding that Petitioner's charge on intent was unconstitutionally burden-shifting. In order to ascertain any alleged unconstitutional burden-shifting effect, Petitioner's trial court's charge must be reviewed in its entirety. A proper review of Petitioner's charge reveals that the same is constitutionally distinguishable from those prior charges found by this Court not to pass constitutional muster, and that the Petitioner's charge on intent is not unconstitutionally burden-shifting. Even assuming the subject charge is unconstitutionally burden-shifting, the error is harmless beyond a reasonable doubt. The evidence in this case reveals a preplanned kidnapping and armed robbery perpetrated by Petitioner and his co-indictee. The victim was orally and anally sodimized, after which he was bound and placed nude in the trunk of a car where he was kept for approximately five hours. At the conclusion of this ordeal, Petitioner sadistically opened the trunk of the car and asked the victim if he was "all right." When the victim replied "Yes sir," the Petitioner closed the trunk of the car, entombing the victim, started the engine, and then drove the car into a pit filled with water, and then jumped from the car just before impact. Petitioner and his co-indictee stood on the bank in order to make certain that the car sank totally beneath the surface of the water. The victim died from drowning. Under no interpretation of these heinous facts could it rea-

sonably be contended that Petitioner's intent to unlawfully kill the victim was not proven beyond a reasonable doubt.

ARGUMENT

I. THERE OCCURRED NO MULTIPLE REPRESENTATION OF CONFLICTING INTERESTS AND NO CONFLICT OF INTEREST ADVERSELY AFFECTED TRIAL COUNSEL'S PERFORMANCE.

A. Mr. Leaphart did not represent Thomas D. Stevens.

Petitioner contends that his trial counsel simultaneously represented Petitioner's interests and those allegedly conflicting interests of his co-indictee. This alleged multiple representation of allegedly conflicting interests, Petitioner contends, gave rise to an actual conflict of interest and denied Petitioner his Sixth Amendment right to the effective assistance of counsel. The district court and the circuit court, however, found no multiple representation, no conflicting interests and no actual or potential conflict of interest.

On March 4, 1981, the federal district court conducted an evidentiary hearing for the specific purpose of affording Petitioner an opportunity to factually support his allegations of a conflict of interest and the alleged ineffectiveness of trial counsel's representation. (J.A. 29-96, 112). After observing the demeanor of the witnesses, assessing their credibility and perusing documentary evidence and exhibits submitted, the district court found Petitioner's

claim of a conflict of interest to be totally without merit. In its orders denying relief on this claim the district court made factual findings which this Court should accept as the same are amply supported by the record and are not clearly erroneous. *See United States v. United States Gypsum Co.*, 333 U.S. 364, 394-395 (1948). The circuit court adopted the district court's opinions denying habeas corpus relief.

In its April 29, 1981, and October 10, 1984, orders the district court credited the testimony of Petitioner's trial counsel, Mr. Alvin Leaphart. (J.A. 112-114; 177-181). Mr. Leaphart had been in practice since 1963, after having clerked for a year and a half. Mr. Leaphart had served as a state court judge, the county attorney for Wayne County, Georgia and counsel for the Wayne County Board of Education. He was a member of the Board of Governors of the State Bar Association of Georgia and a member of the Georgia Trial Lawyers Association and the American Trial Lawyers Association. Prior to representing Petitioner, Mr. Leaphart had represented other criminal defendants against whom the death penalty had been sought under Georgia's present capital punishment statute. In those cases he had been successful in obtaining sentences less than death, and in one instance he obtained an acquittal. (J.A. 68-69).

Mr. Leaphart and his partner in a three person law firm, Mr. Robert B. Smith, were separately appointed to represent Petitioner and his co-indictee respectively. (J.A. 30-31). Petitioner and Stevens had separate trials with Petitioner tried first.[2] Petitioner's confession and Private

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[2]Stevens was tried separately, convicted and is presently under a sentence of death. *Stevens v. State*, 245 Ga. 583, 266 S.E.2d 194 (1980), *cert. denied*, 449 U.S. 891 (1980).

Botsford's testimony were the primary sources of evidence at Petitioner's trials. Petitioner did not testify, nor was evidence of co-indictee Stevens' confession or its contents made known to the juries at Petitioner's original trial or the retrial on sentencing.

During his representation of Petitioner, Mr. Leaphart interviewed co-indictee Thomas D. Stevens. (J.A. 32). Although Petitioner at pages 13 and 20 of his brief characterizes this interview as an attorney-client conference, the record evidence belies this assertion. The record shows, and the district court found, that Mr. Leaphart interviewed Stevens solely in his capacity as counsel for Petitioner Burger. (J.A. 177-178, 51, 65). In preparing Petitioner's case for trial Mr. Leaphart made use of Mr. Smith's talents and expertise in that he and Mr. Smith shared the legal research, discussed the issues and Mr. Smith sat with and assisted Mr. Leaphart during the trial of Petitioner's case. (J.A. 35, 36, 177). Mr. Leaphart, on the other hand, took no part in the subsequent trial of Stevens. (J.A. 35, 177).

Mr. Leaphart and Mr. Smith "collaborated" on preparation of the appelllate briefs, with Mr. Leaphart being primarily responsible for the physical preparation of the briefs on appeal from reimposition of the death penalty. (J.A. 54).

Mr. Leaphart clearly testified that he understood what a conflict of interest was and how it could impact on counsel's representation. (J.A. 34). Mr. Leaphart testified, "nothing ever arose that I felt was a conflict." (J.A. 72). Neither Mr. Leaphart, Mr. Smith, the trial court or Petitioner ever raised the possibility of a conflict of interest. (J.A. 32, 179). The district court found as fact that Mr.

Leaphart, via timely objections and motions, went to great pains to create a distinction in the minds of the jurors between those criminal acts performed by Petitioner and those performed by Stevens. (J.A. 72-73, 114, 177). Through continuous objections and cross-examination Mr. Leaphart sought to establish that "Stevens initiated the whole thing and that Burger was merely following his instructions." (J.A. 38, 72-73, 114, 177). Mr. Leaphart sought to distance Petitioner from those aggravating acts of oral and anal sodomy performed on the victim by Stevens. This consistent strategic approach by Mr. Leaphart manifested itself through all phases of the trial, including closing arguments.

On the retrial on sentencing Mr. Leaphart prepared and used a chart which listed Petitioner and his co-indictee side-by-side, graphically displaying the disparity in their ages and in the number and severity of the criminal acts that each performed. (J.A. 37-39). (*See* Plaintiff's Exhibit No. 1 from the federal evidentiary hearing.) Via the use of this chart Mr. Leaphart sought to tangibly portray Stevens as the "architect" of the crime and the prime mover behind the murder.

Petitioner failed to show that any attorney other than Mr. Leaphart authored and filed the many pretrial and post-trial pleadings on Petitioner's behalf. An examination of the transcripts of Petitioner's original trial and retrial on sentencing reveals that Mr. Leaphart alone vigorously tried Petitioner's cases in their entireties. Petitioner failed to show that Mr. Leaphart ever appeared or participated as counsel for co-indictees Stevens at Stevens' subsequent trial and retrial on sentencing. Similarly, Petitioner produced no evidence that Mr. Leaphart ever billed

the county for services rendered on behalf of any defendant other than Petitioner.

This Court has long recognized the Sixth Amendment's guarantee of the right to effective assistance of counsel. *Powell v. Alabama*, 287 U.S. 45 (1932); *McMann v. Richardson*, 397 U.S. 759, n. 14 (1970). Until its decision in *Strickland v. Washington*, 466 U.S. 668 (1984) the Court had not, however, elaborated on the meaning of the requirement of "effective assistance." In *Strickland, supra*, the Court set forth a two-prong analysis for testing the merits of a convicted defendant's claim of ineffectiveness of counsel. First, the defendant must show that counsel's performance was deficient, i.e., that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance of counsel actually prejudiced the defense, i.e., that counsel's errors were so serious as to deprive the defendant of a trial whose result is reliable. *Strickland* at 687.

In certain Sixth Amendment contexts prejudice is presumed, i.e., actual or constructive denial of the assistance of counsel altogether, or those situations involving various kinds of state interference with counsel's assistance. *Strickland* at 692. Specifically regarding conflict of interest claims, the Court, citing its earlier decision in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), opined that prejudice is to be presumed when counsel is shown to have been burdened by an actual conflict of interest. In this context, however, the rule of presumptive prejudice "is not quite the per se rule of prejudice that exists for the Sixth Amendment claims mentioned above [i.e., total denial of assistance of counsel and various types of state interference with counsel's as-

sistance]." *Strickland* at 692. Regarding conflict of interest claims the Court stated:

> Prejudice is presumed only if the defendant demonstrates counsel "*actively represented conflicting interests*" and that "*an actual conflict of interest adversely affected his lawyer's performance.*" (Cite omitted).

Id., at 692. (Emphasis added).

Based upon the historical facts gleaned from the testimony of Mr. Leaphart, the examination of transcripts of Petitioner's state court proceedings and the examination of documentary evidence and exhibits submitted at the federal habeas corpus evidentiary hearing, the district court concluded that the record simply did not support a finding of multiple representation of Petitioner and his co-indictee by Mr. Leaphart. Specifically the district court found, "Thus, the present case would hardly demand an inference of error where *the two indictees were tried separately by different*, if also professionally associated, *attorneys.*" (J.A. 113). (Emphasis added). The court further found, "Nor can it be said that the overlap of counsel, to the extent it existed, infected Leaphart's representation as to constitute an active representation of conflicting interests." (J.A. 180). Petitioner completely failed to factually prove his assertion of multiple representation.

B. Petitioner's interests at trial were not in conflict with those of his separately tried and separately represented co-indictee.

In addition to the district court's determination that the attorneys' assisting each other did not constitute multiple representation of each other's clients, the record before this Court also shows that Petitioner's interests at

trial were not in conflict with those of his co-indictee. Accordingly, the district court correctly found no conflicting interests between Petitioner and Stevens.

At the federal evidentiary hearing, Mr. Leaphart testified that to his knowledge the defenses presented in the separate trials of Petitioner and his co-indictee were not in conflict, but rather were the same, i.e., to put the state to its proof. (J.A. 35). The district court clearly credited Mr. Leaphart's testimony. (J.A. 114). Significantly, as previously noted, Petitioner was tried first and separately from his co-indictee. No evidence of Stevens' confession or its contents was presented at either of Petitioner's trials. Petitioner has produced no evidence that any member of either of Petitioner's juries was aware of the theory upon which Stevens' cases were tried, or the issues involved. In fact, community knowledge regarding the crime was so minimal that at Petitioner's original trial no venirepersons were excused due to fixed opinions regarding Petitioner's guilt or innocence. At Petitioner's retrial on sentencing only two venirepersons were removed due to fixed opinions as to punishment. (Respondent's Exhibit C, 23-25; 41-44).

Because Petitioner and Stevens were represented by separate counsel, at separate trials before juries who were only aware of the issues and theories in the case before them, the district court correctly concluded that there existed no actual or potential conflict between Petitioner's interests and Stevens' at trial. (J.A. 114).

C. Mr. Leaphart's representation of Petitioner was unencumbered by any conflict of interest.

Petitioner's only argument regarding the alleged adverse effect upon Mr. Leaphart's performance by an alleged conflict of interest is Petitioner's contention that counsel's asserted failure to offer Petitioner's testimony in exchange for a life sentence and counsel's decision not to argue Petitioner's alleged lesser culpability on direct appeal resulted from this contended conflict of interest. The district court properly found these assertions to be without merit as no evidence of an adverse impact was shown.

On questioning by the federal habeas corpus court Mr. Leaphart testified as follows:

> THE COURT: Did you pull any punches in order to protect Stevens?
>
> A. No.
>
> THE COURT: If crucifying Stevens would have helped Burger, would you have done it?
>
> A. Yes, sir.

(J.A. 65).

Regarding Petitioner's contentions that Mr. Leaphart never offered Petitioner's testimony against Stevens in exchange for a life sentence, Mr. Leaphart testified that there was in fact no discussion between the district attorney and him on this point. (J.A. 52-53). Mr. Leaphart explained that during his representation of Petitioner, he constantly tried to negotiate a plea with the district attorney for a life sentence, but that the district attorney "just flatly refused to even discuss it in any terms." (J.A. 74-75, 178-179). Contrary to Petitioner's characterizations of the record,

the district attorney refused to open any avenues for plea negotiations and Mr. Leaphart was never afforded the opportunity to engage in any negotiations on any level. As the uncontradicted testimony of Mr. Leaphart shows, "He [the district attorney] insisted on trying it and insisted on seeking the death penalty." (J.A. 75). In light of the unyielding position taken by the district attorney, considering his possession of a valid signed and sworn confession, physical evidence, eyewitness testimony from Private Botsford, and the heinous nature of the crime, the lack of merit of Petitioner's contention becomes apparent.

Petitioner's contention that the alleged conflict of interest manifested itself in Mr. Leaphart's failure to argue Petitioner's alleged lesser culpability on direct appeal is also without merit. Mr. Leaphart testified that on direct appeal he "raised every allegation that I could find." (J.A. 72).[3] Mr. Leaphart, experienced trial counsel, realized that arguments of lesser culpability and ingenious graphic demonstrations of such arguments are more appropriately made to trial juries. Although Mr. Leaphart commendably attempted to portray Petitioner as the less culpable party before Petitioner's juries, the fact remains that while Petitioner did not actually engage in the acts of oral and anal sodomy committed on the victim, the Petitioner looked on while these acts occurred after having actually participated in the precedent burglary, kidnapping and armed robbery. The uncontradicted evidence shows that seconds before he

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[3]Respondent notes that it was Mr. Leaphart's efforts as trial and appellate counsel which resulted in the Supreme Court of Georgia's first opinion vacating Petitioner's originally imposed sentence of death. *See Burger v. State*, 242 Ga. 28, 247 S.E.2d 83 (1978).

murdered the victim, Petitioner opened the trunk of the cab and sadistically asked the bound and nude victim if he was "all right." (T. 345-346). These acts by Petitioner, as noted by the Supreme Court of Georgia in affirming Petitioner's death sentence, "are outrageously and wantonly vile and inhuman under any reasonable standard of human conduct." *Burger v. State*, 265 S.E. 2d at 800. Thus, any *pro forma* appellate argument of lesser culpability would constitute a frivolous assertion. The evidence clearly shows that no "actual conflict of interest adversely affected [Petitioner's] lawyer's performance." *Strickland* at 692.

II. AFTER CONDUCTING A THOROUGH INVESTIGATION, COUNSEL'S STRATEGIC DECISION NOT TO PRESENT POTENTIALLY HARMFUL EVIDENCE AT PETITIONER'S RESENTENCING TRIAL DOES NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner contends that trial counsel's investigation for potentially mitigating evidence for presentation on the sentencing phase of trial was inadequate, that such evidence in mitigation did in fact exist at the time of trial and that counsel was ineffective for failing to present the same. Contrary to Petitioner's assertions, the district court and the circuit court found that counsel's investigation was not inadequate, that the alleged mitigating evidence Petitioner now identifies by affidavits was never made known to trial counsel and that counsel's strategic decision not to present the potentially damaging character evidence he possessed was a sound tactical decision.

After a thorough investigation and consultation with Petitioner and Petitioner's mother, Mr. Leaphart decided

not to direct the jury's attention to character-oriented mitigating evidence at Petitioner's second sentencing trial. (J.A. 49, 164). Petitioner produced absolutely no evidence that he ever contested Mr. Leaphart's tactical decision. Cognizant of the broad scope of mitigating evidence admissible on the sentencing phase of capital trials in Georgia, it was Mr. Leaphart's judgment that the best approach on the issue of sentencing was to argue the difference in age between Petitioner and Stevens, as well as the differing degrees in their participation in the crime. (J.A. 164-165). Additionally, Mr. Leaphart sought to prevent the district attorney from proving his case on sentencing by use of the rules of evidence and employment of every objection and motion Mr. Leaphart deemed relevant. (J.A. 165).

Mr. Leaphart was also cognizant of the wide range of evidence the State is permitted to present at sentencing trials, along with the State's unrestricted right to far-ranging cross-examination, in addition to the overwhelming strength of the evidence of guilt and aggravation against his client, thus he relied heavily on his closing argument to the resentencing jury, to which the state would have no rebuttal. In Mr. Leaphart's argument at the retrial on sentencing, counsel, with the use of a visual aid, emphasized the acts of co-indictee Stevens while he sought to minimize Petitioner's involvement in the murder and related crimes. The district court found that counsel "fully emphasized the fact that Stevens was 20 years old at the time of the crime, while Burger was only 17; that Stevens, the chief architect of the crimes, had considerable influence over Petitioner." (J.A. 165). Mr. Leaphart enumerated the series of criminal acts committed by Stevens and contrasted them to the relatively

fewer criminal acts committed by Burger, who counsel contended "was only following Stevens." (J.A. 165).

Counsel next attempted to stimulate the jurors' religious sensitivities by arguing that the concept of an "eye for an eye" was a notion of justice popular with people of the Old Testament, but not with people of today. Mr. Leaphart concluded his closing argument by reemphasizing the contrast between the criminal acts committed by Stevens, and Burger's relatively lesser involvement. Mr. Leaphart left the jury with the question, "[w]hat would Jesus Christ do if he were sitting in our shoes today?" (J.A. 165).

Mr. Leaphart testified that his strategic approach to Petitioner's retrial on sentencing, as outlined above, constituted his best strategy in light of the evidence and information available to him. Counsel's investigation of possible mitigating evidence included numerous interviews with Petitioner, Petitioner's mother, an attorney who had befriended Petitioner and his mother, in addition to counsel's consultation with a psychologist and review of reports of psychologists obtained through Petitioner's mother and interviews with the state's witnesses. (J.A. 166, 73).

The district court found as fact that Petitioner did not provide his trial counsel with the names of those individuals whose testimony Petitioner proffered by affidavit at the federal evidentiary hearing. (J.A. 168-169, 173). Because this information was not made available to counsel at the time of trial, notwithstanding the conducting of a thorough background investigation, the same should not be considered in an evaluation of the reason-

ableness of Mr. Leaphart's decision not to present evidence at the retrial on sentencing. *Strickland v. Washington*, 466 U.S. at 689-690. Notwithstanding the same, in reviewing the affidavits of these purported witnesses, the district court astutely noted that the proffered testimony could have proved extremely damaging to Petitioner if the same had been presented to his jury on sentencing, possibly insuring the return of a death sentence. (J.A. 172, n. 7). Even at its best, this proffered testimony would not have altered the sentencing profile presented to Petitioner's jury.

Petitioner was not placed on the witness stand during the retrial on sentencing because Mr. Leaphart was fearful of subjecting him to cross-examination and alienating the jury by exposing them to Petitioner's gloating and sadistic recitation of the facts surrounding the victim's kidnapping, armed robbery, subjection to oral and anal sodomy and the victim's ultimate murder. (J.A. 75-76, 166). In addition, the district court found as fact that Petitioner never gave counsel the names of any witnesses that might have been helpful to Petitioner at the retrial on sentencing. (J.A. 73, 51).

Despite the foregoing, counsel, in consultation with Petitioner's mother, ascertained the existence of an attorney in another state who had served as Petitioner's "big brother." (J.A. 57, 169). After consultation with this attorney regarding Petitioner's background, Mr. Leaphart concluded that "I was not given any information by him that helped." (J.A. 57). Petitioner produced no evidence to the contrary.

Mr. Leaphart reviewed reports of psychologists who had examined Petitioner in the past and reviewed the

possibility of the use of psychological testimony at the resentencing trial with a psychologist counsel had retained. (J.A. 57, 62). Mr. Leaphart testified that after consultation with the psychologist he knew that the psychologist's testimony would be that Petitioner was not insane, that Petitioner enjoyed committing criminal acts and that Petitioner's psychopathic personality was such that continued incarceration was required, at a minimum. (J.A. 62). (Respondent's Exhibit A at 248-251). Counsel testified that he elected not to utilize this testimony at the retrial on sentencing, and that he did not move for an additional court ordered psychiatric or psychological examination for fear that Petitioner would be examined by a state psychiatrist or psychologist whose test results would be adverse to Petitioner and made available to the prosecution. (J.A. 63).

With Petitioner's mother, and with Petitioner, counsel discussed his reluctance to place Petitioner on the witness stand and his hesitancy to subject Petitioner's mother to cross-examination because the district attorney might unearth the fact that Petitioner "had been involved in a beating and a number of things that indicated violence and stuff at an earlier—[point in his life]." (J.A. 49, 167). Through his investigation, counsel was aware that Petitioner had spent time in Florida, where he "Had gotten in some trouble down in Florida and then he went back up north where he lived and got in some trouble up there." (J.A. 52). Counsel testified that "very basically, I couldn't find anything in Mr. Burger's background which I felt would be helpful. You know, I could have put his mother up, I'm sure. And she could have said some nice things about him. But, my feeling was that a lukewarm

witness would have without any real thing to say would have possibly been harmful." (J.A. 52). The district court noted, "This judgment is not unreasonable, especially in light of the fact that calling a character witness to the stand is not without risk; there are, almost invariably, unknown poisons to be hatched out of the mud by way of cross-examination." (J.A. 171-172). *Id.*, n. 7. After having had an opportunity to observe the witness' demeanor and lack of candor, the district court specifically refused to credit Petitioner's mother's testimony that she never discussed Petitioner's background with Mr. Leaphart. (J.A. 173, n. 8). Such assessments of credibility and candor, or the lack thereof, and the impact of the same upon Petitioner's jury on resentencing were properly made and acted upon by Mr. Leaphart.

In addition, Mr. Leaphart testified that he knew that Petitioner's "mother and father had separated at an early age . . . ." (J.A. 51-52). Counsel attempted to, but was never able to locate Petitioner's father or Petitioner's wife, who left Petitioner shortly after the murder. (J.A. 74).

Mr. Leaphart also talked to co-indictee Stevens and investigated Stevens' background, but discovered nothing about Stevens that would have been of benefit to Petitioner at trial. (J.A. 177, 778, 51, 65). Petitioner has produced no evidence to the contrary.

This exhaustive investigation into Petitioner's background convinced counsel that a more in depth investigation would not have been a profitable pursuit. Confronted with overwhelming evidence of Petitioner's guilt and overwhelming evidence in aggravation, compounded by

evidence not only of Petitioner's signed but also sworn confession, counsel concluded that presenting the available lukewarm background and character evidence to Petitioner's resentencing jury would at best prove unproductive, and of even greater concern, in the crucible of cross-examination, actually damaging to his client.

Contrary to Petitioner's assertions at page 31 of his brief, Mr. Leaphart's strategic decision not to present potentially damaging character evidence to Petitioner's resentencing jury was not grounded upon an erroneous assumption that presentation of evidence by the defendant on the sentencing phase of a capital trial would divest the defendant of the right to closing argument. At the federal evidentiary hearing Mr. Leaphart testified regarding his preparation of the Petitioner for trial at the Petitioner's original trial on guilt/innocence. (J.A. 75). While explaining his reasons for not placing the Petitioner on the witness stand during the original trial on guilt/innocence, the district court interrupted and posed several questions to Mr. Leaphart specifically with reference to counsel's reasons for not placing Petitioner on the witness stand during the sentencing phase of trial. (J.A. 75-76). At the conclusion of questioning by the court, Mr. Leaphart's testimony was directed back to that original line of questioning regarding his preparation for the original trial on guilt/innocence. (J.A. 76). During his testimony regarding his conduct of the original trial on guilt/innocence, Mr. Leaphart testified that he "didn't have any witnesses I thought [were] particularly strong. And, I felt that the use of those witnesses versus the loss of the final argument to the jury, that I shouldn't do it. I felt that it was more advantageous to maintain

that. *That was in the trial in the original case.*" (J.A. 76). (Emphasis added). As the foregoing clearly reveals, Mr. Leaphart's testimony revealing his valid concern with retaining both opening and closing arguments was directed to the guilt/innocence phase of Petitioner's original trial, not Petitioner's retrial on sentencing as Petitioner contends before this Court.

In *Strickland v. Washington, supra* and *United States v. Cronic*, 466 U.S. 648 (1984), the Court articulated a two-prong test for analyzing ineffective assistance of counsel claims. The defendant must establish that his counsel's performance fell below an objective standard of reasonableness, and that there existed a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. This Court defined a reasonable probability as a probability sufficient to undermine confidence in the outcome of the trial. These legal principles reveal that when a defendant challenges the death sentence the issue is "whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 446 U.S. at 694. In making this determination, the totality of the evidence before the jury must be considered. As this Court noted in *Strickland* at 696, "a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." A defendant, in order to prevail on an ineffective assistance of counsel claim, must satisfy both the performance and the prejudice prongs of the aforementioned test.

In utilizing this test a reviewing court's inquiry must be whether counsel's assistance was reasonable considering all the circumstances as known to counsel at the time of trial. *Strickland* at 688. Judicial scrutiny of counsel's performance must be highly deferential. Because of the difficulties inherent in making this evaluation, in light of the distorting effects of hindsight, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that under the circumstances, the challenged action 'might be considered *sound trial strategy.*'" *Strickland* at 689. (Emphasis added).

As regards counsel's duty to investigate, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. *Strickland* at 690. "Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation . . . [a] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland* at 690-691.

The evidence in this case clearly shows that Mr. Leaphart made a thorough investigation of Petitioner's background for potential mitigating evidence. Cognizant of the low quality of the character evidence available to him at the time of trial, the evidence in aggravation of punishment in possession of the state and after due consideration of the potential adverse impact upon Petitioner's case as a result of the cross-examination of Petitioner's character

witnesses, including Petitioner, Mr. Leaphart made a sound strategic decision not to present this potentially damaging evidence at the retrial on sentencing. Counsel's strategic decision, made after a thorough investigation of the law and facts relevant to those plausible options available, was nothing more than the traditional trial decision historically allocated to trial counsel. If Mr. Leaphart had presented at Petitioner's retrial on sentencing, the lukewarm potentially damaging character evidence available to him and if the ill effects likely to be borne as the result of a thorough and sifting cross-examination by the district attorney had in fact become a reality, counsel for Petitioner would no less vigorously advocate that Mr. Leaphart's decision to present the same was unsound and that he was ineffective. The acknowledgement of this reality, inherent in post-trial litigation in all capital cases, underscores the wisdom of this Court's opinion that trial counsel's strategic choices made after a thorough investigation of relevant law and facts are "virtually unchallengeable." *Strickland* at 690. Petitioner would have this Court disregard the teachings of *Strickland, supra* and its predecessors and conclude that notwithstanding the legitimate exercise of sound trial strategy, engaged in after a thorough investigation of the relevant law and facts known to counsel at the time of trial and after consultation with his client, Petitioner was rendered ineffective assistance because counsel professionally determined that it was not in Petitioner's best interest to present potentially damaging evidence on Petitioner's retrial on sentencing. This Court's opinions in *Strickland, supra* and its predecessors demand that Petitioner's assertion be found to be without merit.

To find ineffective assistance of counsel in this case would require the promulgation of a *per se* rule requiring trial counsel to produce evidence on the sentencing phase of a capital trial regardless of legitimate strategic concerns. Such a rule would be contrary to traditional notions of Anglo-American jurisprudence and would completely undermine the ability of counsel to effectively represent his client. No longer would an attorney be able to exercise his professional judgment on behalf of his client, but counsel would be reduced to a mechanical conduit for the production of evidence, regardless of its consequences.

III. THE TRIAL COURT'S CHARGE ON INTENT WAS NOT UNCONSTITUTIONALLY BURDEN-SHIFTING.

Petitioner contends that because his jury charge on intent contains two sentences that were also contained in the trial court's charge found to be unconstitutionally burden-shifting in *Francis v. Franklin*, 471 U.S. —, 105 S.Ct. 1965 (1985), this charge must likewise be found to be unconstitutionally burden-shifting. The district court found Petitioner's contention to be totally without merit. The circuit court adopted the district court's opinion on this issue. The circuit court subsequently, on remand from this Court, applied a harmless error analysis to conclude that notwithstanding the alleged burden-shifting nature of the charge, any error was harmless beyond a reasonable doubt. *Burger v. Zant*, 513 F.Supp. 772 (S.D. Ga. 1981), *rev'd in part, aff'd in part*, 718 F.2d 979 (11th Cir. 1983), *vacated and remanded*, — U.S. —, 106 S.Ct. 41 (1985), *on remand*, 785 F.2d 890 (11th Cir. 1985), *reh'g denied*, 796 F.2d 1313 (1986).

The trial court's charge at the conclusion of the guilt/innocence phase of trial spanned eleven pages of trial transcript. The court thoroughly charged on the defendant's presumption of innocence (J.A. 20), the state's burden of proof on each element of the offense beyond a reasonable doubt (J.A. 20), the definition of reasonable doubt (J.A. 20), the definitions of direct and circumstantial evidence (J.A. 23), a person is not to be presumed to act with criminal intent (J.A. 24. 25), definitions of general and specific intent (J.A. 24, 25) and the definition of malice and felony murder. (J.A. 26). From this entire charge Petitioner contends that the following two sentences rendered his entire trial on the issue of guilt fundamentally unfair in that they allegedly relieved the state of its burden of proof on the issue of malice:

> The acts of a person of sound mind and discretion are presumed to be the products of the person's will. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts.

(J.A. 25).

In support of his position Petitioner merely notes that these two sentences are "virtually verbatim" the instruction that was found to be unconstitutionally burden-shifting in *Francis v. Franklin*, 471 U.S. —, 105 S.Ct. 1965 (1985). Accordingly, Petitioner contends that the inclusion of these two talismanic sentences in his charge mandates a finding that his trial court's charge on "malice" (not intent) is unconstitutionally burden-shifting.

There exist several flaws of major proportion in Petitioner's argument that are dispositive of this issue. Initially, the two talismanic sentences dissected out of the

trial court's charge by Petitioner do not address the element of malice under Georgia law as Petitioner contends. These two sentences address instead the general intent of an individual to accomplish the natural and probable consequences of his or her physical acts. At a later point in its charge the trial court gave a clear, concise and constitutionally sound instruction on the concept of malice. (J.A. 26). The trial court's actual malice instruction is not attacked by Petitioner.

Secondly, contrary to Petitioner's assertions, *Franklin, supra,* does not mandate the wholesale vacating of convictions merely upon a petitioner's identification of language in his or her charge similar to that contained in the trial court's charge reviewed in *Franklin, supra.* The Court's opinions in *Franklin, supra* and *Sandstrom v. Montana,* 442 U.S. 510 (1979), do not constitute new law, nor do they establish any new analytical approach to the constitutional evaluation of jury charges for alleged unconstitutional burden-shifting effects. The protection "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged" had been provided by the Due Process Clause of the Fourteenth Amendment long before the decisions in *Sandstrom* and *Franklin. Franklin,* 105 S. Ct. at 1970. Likewise, the proper analysis to be used by a reviewing court testing a charge for unconstitutional burden-shifting effects had been established prior to *Sandstrom. See Cupp v. Naughten,* 414 U.S. 141 (1973). The decisions in *Sandstrom* and *Franklin* are simply fact specific applications of those long standing legal protections and principles identified above. Recognition of this fact reveals the total lack of merit of Petitioner's assertion

that the identification of talismanic words and phrases in a trial court's charge is sufficient to mandate a finding of unconstitutional burden-shifting effects.

Thirdly, application of those principles discussed above reveals that the trial court's charge on general intent was not unconstitutionally burden-shifting. Unlike the trial court's charge reviewed in *Franklin, supra,* the relevant portions of which are cited in the dissenting opinions, Petitioner's trial court followed the two talismanic "*Franklin*" sentences with an instruction on specific intent to commit the crime charged. This instruction by Petitioner's trial court significantly altered the manner in which a reasonable juror would understand the trial court's charge in Petitioner's case, as compared to the trial court's charge in *Franklin.*

In the instant case those two challenged sentences of the trial court's charge ["the acts of a person of sound mind and discretion are presumed to be the products of a person's will. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts."] refer only to the accomplishment of physical acts; they intimate no legal presumption, inference or conclusion to be drawn therefrom regarding criminal intent to kill or malice. This observation is buttressed by the fact that Petitioner's jury was thereafter immediately charged that a person will not be presumed to act with criminal intention, and, unlike Franklin's jury, was told that a specific intent to commit the crime charged was an essential element that the state must prove beyond a reasonable doubt. The trial court's charge on criminal intent coupled with that paragraph contained in Petitioner's charge but missing from the charge in Franklin's case regarding specific in-

tent to commit the crime charged, address themselves exclusively to the unlawful intent to kill. No reasonable juror hearing this charge, in the sequence in which it was actually given, would understand that "he could presume intent to kill but not the absence of justification or provocation." *See Franklin*, 105 S.Ct. at 1974. Further, any reasonable juror hearing this instruction would be clearly informed that the two talismanic *"Franklin"* sentences referred only to the accomplishment of physical acts and intimated no legal presumption, inference or conclusion to be drawn regarding criminal intent to kill or malice, as these latter principles were separately and later addressed in instruction by the trial court.

Viewing the trial court's charge as a whole, as required by *Cupp v. Naughten, supra,* as compared to dissecting and viewing in artifical isolation those two talismanic sentences identified by Petitioner, it becomes readily apparent that the trial court's charge on the accomplishment of physical acts (the *Franklin* language) and that portion regarding criminal intent and specific intent to kill, create no unconstitutional burden-shifting effect. First, Petitioner's jury was simply informed that a person usually intends the consequences of his physical acts. Next, the jury was told that no person is to be presumed to act with criminal intent, but rather such intent may be found upon consideration of the evidence produced at trial. Thirdly, having already been charged on the use of direct and circumstantial evidence, the jury was told that a specific intent to unlawfully kill the victim was an essential element that the state must prove beyond a reasonable doubt, and that the state could do this by proof of the defendant's acts and conduct. The jury was also informed that they *may infer* this spe-

cific intent to unlawfully kill the victim from proof of evidence of the circumstances of the killing, "or it *may be presumed* when it is the natural and necessary consequences of the act." (J.A. 25). (Emphasis added).

Petitioner's jury was clearly informed that the unlawful intent to kill is not, as a matter of law, to be presumed from proof of the natural and necessary consequences of a person's acts; however, "it may be presumed." (J.A. 25). The trial court's charge, when properly viewed as a whole, is internally consistent, clear, concise and is not unconstitutionally burden-shifting. Petitioner's contentions to the contrary have properly been found to be totally without merit by every state and federal reviewing court that has addressed this claim on its merits.

IV. IN THE CONTEXT OF THIS KIDNAPPING, ARMED ROBBERY, TORTURE, SEXUAL ASSAULT AND WITNESS ELIMINATION MURDER, THE TRIAL COURT'S CHARGE ON INTENT WAS HARMLESS BEYOND A REASONABLE DOUBT.

Petitioner contends that the trial court's charge that "The acts of a person of sound mind and discretion are presumed to be the products of the person's will [and] a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts" is unconstitutionally burden-shifting and is not harmless beyond a reasonable doubt. (J.A. 25). The circuit court, relying upon this Court's decision in *Rose v. Clark*, — U.S. —, 106 S.Ct. 3101 (1986), correctly found that under the facts of Petitioner's case, the challenged charge is harmless beyond a reasonable doubt. *Burger v. Kemp*, 785 F.2d 890 (11th Cir.) *reh'g denied*, 796 F.2d 1313 (11th Cir. 1986).

In support of his assertion that the two talismanic sentences dissected from the trial court's charge were not harmless beyond a reasonable doubt, Petitioner argues that his possession of the requisite intent to commit the crime of murder was contested at trial. Because his possession of the requisite intent was allegedely contested at trial, Petitioner concludes that the trial court's alleged burden-shifting charge on the issue of intent can never constitute harmless error.

The flaws in Petitioner's argument are readily apparent. Initially, Petitioner's argument before this Court that an alleged burden-shifting charge on an issue contested at trial can never be found to be harmless was disposed of adversely to Petitioner by this Court in *Rose v. Clark*, — U.S. —, 106 S.Ct. 3101, 3109 (1986). Secondly, an examination of the Court's opinion in *Rose, supra* reveals that a harmless error analysis is applicable to alleged burden-shifting charges, and that such an analysis asks:

> Whether the evidence was so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption.

Rose, supra at 3190.

In order to effectuate this Court's harmless error analysis, all of that record evidence available to the convicting jury must be evaluated by the reviewing court. In this case that evidence made available to Petitioner's convicting jury is contained in Respondent's Exhibit A, i.e., the transcript of Petitioner's trial on the issue of guilt. The evidence at trial, including Petitioner's confession, revealed that when Petitioner and co-indictee Stevens ran out of money while drinking beer at the Enlisted Men's Club

at Fort Stewart, Georgia they coolly planned the armed robbery of a cab driver. (J.A. 6). When the first intended victim arrived accompanied by another male in the cab Petitioner and Stevens aborted the robbery and decided to try for a more vulnerable victim. (J.A. 6-7). In order to insure their success, they burglarized the Mess Hall and stole a knife sharpener and butcher knife. They then summoned another cab. In order to make sure that the robbery was worth their time, they first asked the cab driver if he could change a fifty dollar bill. When he replied that he could, Petitioner and Stevens asked to be taken to the Savannah Airport. At a prearranged signal, Petitioner, armed with the butcher knife, and Stevens, armed with a knife sharpener, overpowered the victim, Roger Honeycutt. (J.A. 7).

After robbing the victim, searching the cab for additional money and stripping the victim naked, Petitioner drove the cab while Stevens forced Roger Honeycutt to commit oral sodomy upon him, after which Stevens anally sodomized Honeycutt. (J.A. 8-9). Meanwhile, Petitioner would ask the victim for directions to the Savannah, Georgia airport. (J.A. 9).

Shortly before arriving at the airport Petitioner and Stevens stopped the cab, bound the nude victim with cord cut from the cab's C.B. radio and locked the victim in the trunk of the cab. (J.A. 9). Petitioner drove the cab on to the Savannah airport, from the Savannah airport to Fort Stewart, Georgia, from Fort Stewart to Jesup, Georgia and then from a convenience store in Jesup, where Petitioner and Stevens had evaded detection by police, to the borrow pit filled with water where the victim was ulti-

mately murdered. Petitioner, at all times, was the driver of the stolen cab, and on occasion would drive the cab in such a manner as to sadistically cause the bound victim to violently roll around in the trunk. (J.A. 9-12).

Petitioner's sadistic impulses and clear intent to kill were further manifested by the fact, as confessed to by Petitioner, that after wiping fingerprints from the cab and before murdering the victim, and while Stevens was away hiding the cab's C.B. radio in the bushes, Petitioner opened the trunk and asked Roger Honeycutt if he was "all right." (J.A. 18). The nude, bound and blindfolded victim replied, "Yes, sir." (J.A. 18). Petitioner, though afforded this opportunity to allow the victim to escape, then closed the lid of the trunk, entombing the victim, started the engine to the cab and drove the cab into the borrow pit, jumping from it just before impact with the water. (J.A. 18). Petitioner coldly admitted to investigating officers that he killed the victim in order to prevent the victim from identifying him and Stevens. (J.A. 13).

Under these facts it defies common sense to contend that the subject kidnapping, armed robbery, sexual assault and witness elimination murder, all of which spanned some five hours, was unintentional. (J.A. 13). "It follows that no rational jury would need to rely on an erroneous presumption instruction to find malice or intent in such cases." *Rose,* 106 S.Ct. at 3108, n.10. Petitioner's contentions to the contrary are totally without merit. Accordingly, if the trial court's instruction containing the two talismanic sentences dissected from its eleven page charge by Petitioner is determined to be unconstitutionally burden-shifting, under this Court's *Rose v. Clark,* harmless error

analysis, the subject charge, under the heinous facts of this case, is harmless beyond a reasonable doubt. If the facts of this case do not warrant a finding of harmless error, the harmless error inquiring becomes a legal fiction.

CONCLUSION

For all of the foregoing reasons, the denial of habeas corpus relief to this Petitioner should be affirmed.

Respectfuliy submitted,

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